UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

April 28, 2005

John S. Lovald, Esq.
Counsel for Plaintiff-Trustee
Post Office Box 66
Pierre, South Dakota 57501

A. Thomas Pokela, Esq.
Counsel for Defendant-Debtor Dale A. Tjeerdsma
Post Office Box 1102
Sioux Falls, South Dakota 57101

Jerry L. Pollard, Esq.
Counsel for Defendant Charlene D. Tjeerdsma
Post Office Box 837
Yankton, South Dakota 57078

Wanda Howey Fox, Esq.
Counsel for Defendant Harmelink & Fox Law Office
Post Office Box 18
Yankton, South Dakota 57078

Subject: *Trustee John S. Lovald v. Dale A. Tjeerdsma, et al. (In re Dale A. Tjeerdsma)*, Adv. No. 04-4074; Chapter 7, Bankr. No. 03-41073

Dear Counsel:

The matter before the Court is the Motion for Summary Judgment filed by Defendant Harmelink & Fox Law Office and the responses thereto filed by Plaintiff-Trustee John S. Lovald, Defendant-Debtor Dale A. Tjeerdsma, and Defendant Charlene D. Tjeerdsma. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, Defendant Harmelink & Fox Law Office's Motion for Summary Judgment will be denied.

Summary. Dale A. Tjeerdsma and his wife Charlene owned the subject real property in Bon Homme County, South Dakota. The couple divorced in 2001. By a subsequent order dated March 5, 2002, the divorce court awarded Dale Tjeerdsma the Bon Homme County realty and imposed on him certain financial obligations for

Charlene's benefit. The title to the realty remained in both parties' names. The divorce decree was docketed in the Bon Homme County Clerk's judgment book on May 1, 2001; the March 5, 2002, property division order was not. Some judgments against the Bon Homme County property were also recorded.[1]

Dale Tjeerdsma("Debtor") filed a Chapter 7 petition in bankruptcy on September 2, 2003. In his schedules, Debtor listed the real property, valued it at $48,000.00, and claimed a $30,000.00 homestead exemption. He further stated that he owed his former wife $54,000.00 under a "Property Settlement." In his Statement of Financial Affairs, Debtor also acknowledged that his former wife had a civil contempt action pending against him in state court.

On October 21, 2003, Charlene Tjeerdsma commenced a nondischargeability action against Debtor. She sought a determination that the balance due her under the divorce was nondischargeable under 11 U.S.C. § 523(a)(15). A default judgment was entered. It provided that she held a nondischargeable claim against Debtor for $47,097.94 and any joint indebtedness owed to the I.R.S. and Yankton Medical Clinic.

In the main case, the case trustee, John S. Lovald, objected to Debtor's claim of a homestead exemption. He said the home had been sold and Debtor was trying to use the $30,000.00 homestead exemption as a shield to avoid using the sale proceeds to pay

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[1] According to a motion to discharge judgments that was filed by Debtor Dale Tjeerdsma in his main case, Bankr. No. 03-41073, the Harmelink & Fox Law Office obtained a judgment against him for $6,544.92 that was transcribed in Bon Homme County on March 20, 2002, and Credit Collections Services obtained a judgment against Debtor for $471.00 that was transcribed to Bon Homme County on July 30, 2003. The motion to discharge judgments also addressed a judgment held by Credit Collections Bureau against Debtor for $443.75 that was filed in Pennington County, South Dakota on May 21, 2003. According to Trustee Lovald's February 17, 2005, summary judgment response in the adversary proceeding, Credit Collections Bureau had a judgment transcribed to Bon Homme County on May 21, 2002 -- which was not reflected in Debtor's motion to discharge judgments -- and Credit Collection Services released its judgment on August 22, 2003.

Charlene Tjeerdsma's divorce-related claim. Debtor did not respond to the objection. An order sustaining the objection was entered December 18, 2003. It provided that, "Debtor's homestead claim should be denied, as to the claim of his ex wife, which Debtor has listed as an unsecured claim."

Debtor's discharge was entered December 2, 2003. Thereafter, Debtor obtained an order acknowledging that his personal liability on the three judgments held by the Harmelink & Fox Law Office (Bon Homme County), Credit Collections Bureau (Pennington County), and Credit Collection Services (Bon Homme County) had been discharged.

On October 21, 2004, Trustee Lovald commenced an adversary proceeding against Debtor, Charlene Tjeerdsma, and the three judgment holders. In his complaint, Trustee Lovald advised the Court that a sale of the Bon Homme County realty had been pending on the petition date and that the land was still titled in both Debtor's and Charlene Tjeerdsma's names. He said the sale closed on October 12, 2004, and the net proceeds were $44,242.82.[2] He said that by agreement of the judgment lien holders and himself, the proceeds were placed in a law firm's trust account, and $30,000.00, which represented Debtor's homestead exemption, was used to pay a large portion of Charlene Tjeerdsma's claim. He asked the Court to determine who among the defendants had a priority claim to the proceeds. According to Trustee Lovald, Defendant-Debtor claimed the March 15, 2004, order discharging judgment discharged both the *in personam* and *in rem* liability; Defendant Harmelink & Fox Law Office said its claim was superior because it had executed on its judgment pre-petition; and Defendant Credit Collections said its judgment lien was superior because it was against both Debtor and Charlene Tjeerdsma.

In her answer, Defendant Charlene Tjeerdsma argued her claim was superior because now she holds a nondischargeable claim and the

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[2] An order approving the sale of the bankruptcy estate's interest in this realty has never been entered, nor has an order approving the payment of sale expenses. Trustee Lovald's request that the sale expenses be approved through this adversary proceeding cannot be granted. A retroactive sale motion, which may include payment of the related expenses, needs to be served and noticed in the main case since title problems may later arise if an appropriate sale order is not entered.

other defendants' judgments have been discharged. In its answer, Defendant Harmelink & Fox Law Office said on August 8, 2003, it had served a garnishment summons, affidavit of garnishment, notice to garnishee, and a garnishment disclosure on Debtor's divorce attorney before the real estate sale closed, and that this caused its lien to attach before any of the other judgment liens. Debtor answered that all the proceeds were either his homestead exemption or his wife's separate property. Neither Defendant Credit Collection Services, Inc., nor Defendant Credit Collections Bureau timely answered.

Defendant Harmelink & Fox Law Office moved for summary judgment. Relying on some admissions that had been addressed only to Defendant-Debtor, the Law Office argued that those admissions established that its judgment lien attached to $9,600.00 in real estate sale proceeds held in a lawyer's trust account on August 11, 2002, apparently relying on some sort of pre-petition execution. Since Trustee Lovald said the subject realty sale was not closed until October 12, 2004, that argument was a bit difficult to follow.

In his response to the summary judgment motion, Trustee Lovald advised the Court that only Defendant Harmelink & Fox Law Office and Defendant Credit Collections Bureau had pre-petition judgment liens against the property. He said Defendant Charlene Tjeerdsma had failed to have the divorce court's March 5, 2002, property division order docketed as a judgment; only the divorce court's earlier May 1, 2001, divorce decree was docketed in the judgment docket book. He thus argued that the $14,242.82 in real property proceeds should be considered an estate asset and distributed to the two judgment creditors of record in Bon Homme County.

Discussion. The order discharging judgments entered December 2, 2003, discharged only Debtor's personal liability on the judgments. The order had no impact on the *in rem* liability of the Bon Homme property to the extent equity exceeded any mortgages and Debtor's homestead claim. *See In Wayne D. and Peggy Taylor*, Bankr. No. 89-40349, slip op. (Bankr. D.S.D. March 19, 1998)(discussion of difference between a judgment discharged under S.D.C.L. § 15-16-20 and 11 U.S.C. § 524(a) and the avoidance of a judgment lien impairing an exemption under 11 U.S.C. § 522(f)).

Further, Defendant-Debtor's failure to respond to Defendant Harmelink & Fox's request for admissions from Defendant-Debtor is

only binding on Defendant-Debtor, not the other parties. Fed.R.Bankr.P. 7036 and Fed.R.Civ.P. 36(b); *Earl Realty, Inc. v. Leonetti (In re Leonetti)*, 28 B.R. 1003, 1009 (D.C. Pa. 1983)(cites therein). Thus, Debtor's inaction does not constitute an admission by Trustee Lovald, who represents the bankruptcy estate's interests that are at issue.

The Court also was unable to follow Defendant Harmelink & Fox Law Office's argument that its judgment lien somehow gained superiority by some pre-petition action it took, especially where a garnishment action, which the Law Office referenced in its answer, would have been an execution on the judgment, not the judgment lien. *See generally In re Lynn K. Swanson*, Bankr. No. 97-10300, slip op. (Bankr. D.S.D. May 8, 1998).

The key issue remains. Does Charlene Tjeerdsma have a judgment lien that attached to the equity in the real property. Sections 15-16-5 and -6 of the South Dakota Code direct the clerk of the circuit court to maintain a judgment docket and to docket all judgments that provide in whole or part the payment of money. Once that judgment has been docketed, a judgment lien is created on the judgment debtor's real property, "except the homestead," in the county where the judgment was entered. S.D.C.L. § 15-16-7. As this Court has interpreted the statute, in reliance on earlier decisions by the South Dakota Supreme Court, the judgment lien attaches to all non exempt realty, including any equity in a homestead that exceeds the value of previously recorded encumbrances and the debtor's $30,000 homestead allowance. *See In re Hughes*, 244 B.R. 805 (Bankr. D.S.D. 1999).

Under South Dakota case law, a judgment lien is valid if the judgment docket entry substantially complied with the applicable statutes. *Muhlenkort v. Union County Land Trust*, 530 N.W. 2d 658, 661 (S.D. 1995). In other words, the docket entry must give constructive notice of the lien. *Id.* The test is whether the docket entry was

> sufficient to apprise a third party of the existence and character of the judgment and 'would induce a prudent and cautious man to make an examination of the proceedings.'

Id. (quoting *Muller v. Flavin*, 83 N.W. 687, 693 (S.D. 1900)).

There appears to be no dispute that the March 5, 2002,

property division order between Dale and Charlene Tjeerdsma was never recorded in the judgment docket. Only the earlier divorce decree was. Thus, the issue becomes whether this divorce order sufficiently put third parties on notice of Charlene Tjeerdsma's subsequent money judgment in the property division order that was never recorded in the judgment docket.

That issue was not raised by Defendant Harmelink & Fox Law Office's summary judgment motion and only collaterally raised by Trustee Lovald in his response to the motion. Thus, it appears that a summary judgment motion by Trustee Lovald and another round of briefs on that issue is needed. That will give all parties the requisite opportunity to address whether Charlene Tjeerdsma has a perfected judgment lien against the real property. *See Heisler v. Metropolitan Council*, 339 F.3d 622, 631-32 (8th Cir. 2003)(to prevent unfairness to the nonmoving party, the court generally cannot resolve a summary judgment motion on issues that were not raised by the moving party).

During this next round in the adversary proceeding, the parties need to insure that the record contains an accurate statement of the dates and amounts of all judgments filed against the Bon Homme County property. The record also should be supplemented to set forth the current amount of Charlene Tjeerdsma's unpaid, pre-petition claim.

An appropriate order will be entered.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
APR 28 2005
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

INH:sh

CC: adversary file (docket original; serve parties in interest)

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

APR 28 2005

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By

Credit Collection Services, Inc.
PO Box 755
Yankton, SD 57078

Credit Collections Bureau
PO Box 9490
Rapid City, SD 57709

Wanda L. Howey-Fox
PO Box 18
Yankton, SD 57078

John S. Lovald
Box 66
Pierre, SD 57501

A. Thomas Pokela
PO Box 1102
Sioux Falls, SD 57117-1102

Jerry L. Pollard
PO Box 837
Yankton, SD 57078

Charlene Delores Tjeerdsma
418 W. 15th St., Apt. 11
Yankton, SD 57078

Dale A. Tjeerdsma
203 2nd Avenue N.
Brook Park, MN 55007-9537